LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 10 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 879.

MAMIE BISHOP, LEONARD SCHUMPERT,
JANICE THOMAS, AUGUSTUS HUMPHERY,
JUANITA UMPHRYES,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

REPLY BRIEF OF PETITIONERS
To Respondent's Brief in Opposition to Petition For Writ of Certiorari.

JAMES R. WILLIS,
202 Cleveland Transit Building,
1404 East 9th Street,
Cleveland, Ohio 44114,
Attorney for Petitioners.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 879.

MAMIE BISHOP, LEONARD SCHUMPERT,
JANICE THOMAS, AUGUSTUS HUMPHERY,
JUANITA UMPHRYES,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

REPLY BRIEF OF PETITIONERS
To Respondent's Brief in Opposition to Petition For Writ of Certiorari.

Respondent's Brief in opposition, in its counter-statement of facts, set forth the following selected points:

1. That "on May 14, 1962, Sergeant Delau received information from a reliable source that one John Powers was operating a clearinghouse at 12806 Edmonton Avenue in Cleveland." (Respondent's Brief at page 5.)

2. That upon later seeing John Powers both enter and leave the Edmonton Avenue address, and upon further developing this lead which led them to the apartment house address of 739 East 125th Street, one of the officers "* * * then entered a common doorway leading to a corridor on the first floor. There were two apartments on the first floor and there was no noise or activity coming from either of these apart-

ments. He then went up a common stairway to a hallway on the second floor, where apartments 5 and 6 were located * * * there was noise coming from both apartments. There was a radio and voices and the considerable clatter of adding machines coming from both apartments." (Respondent's Brief at page 7.)

3. That the issuing magistrate "was informed in detail of the disclosure made in three days of surveillance by all three officers"; whereupon, "[t]he judge signed the affidavit and a search warrant was obtained." (Respondent's Brief at page 7.)

Based on these selected excerpts, it is apparent that respondent is attempting thereby to suggest the reliability of their "informer" was established "in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in the opinions of this Court applying that amendment." *Ker v. California*, 374 U. S. at 33. What is being overlooked, however, is that here refusal to disclose the identity of an alleged informer denied the petitioners the only effective and available means of rebutting the police officers' testimony that there was an informer, that he gave them any information, that he was reliable, and that they were reasonable in relying on such information.

Next, by virtue of such argument—with the repeated references to a common doorway and a common hallway—they mean to suggest either that the officer, who admitted he entered this building and ascended to the second floor to eavesdrop, was not a trespasser, or that he had a lawful right to eavesdrop on the second floor of this building (that is, search) for evidence to support the issuance of a search warrant.

The short answer, of course, is that the statutes of Ohio, R. C. of Ohio, § 2909.21, forbid anyone without lawful authority from entering upon the premises of another. But, in this cause, that is not all. For it is clear not only

that their method in entering was unlawful, but their purpose was to invade the right of privacy of the tenants and their guest who might perchance be on the premises. Clearly such brazen conduct cannot be countenanced, which is what is being done when evidence acquired by such conduct is used as a basis for establishing probable cause for a search warrant. Surely, it is the law that where the information on which a warrant was obtained was the result of a trespass within the curtilage of the petitioner, a search under such warrant is constitutionally impermissible.

Also, in its statement of facts respondent unrealistically emphasizes the contention that the magistrate was meticulously informed of the details of their surveillances. If it does not suffice to say that the record exposes considerable doubt as to whether or not any policeman other than Sergeant Delau talked to the magistrate before he authorized the search, then it need only be said, in the "no more than 5 minutes" Sergeant Delau testified he talked to the magistrate (during which conversation he affirmatively indicated that the other officers involved were somewhere else) that from a time factor alone it would tax credulity to believe that "the judge was informed in detail" of their observations. (See R. 46, 58.) On the other hand, assuming *arguendo* that such details were furnished the magistrate, still even these "facts" would not have satisfied the requirement that probable cause must exist for the issuance of a warrant.

I.

The further argument made by respondent (at page 13 of its brief) reduces itself to a bold contention that if probable cause exists to search one of two apartments, the designation in the warrant of both apartments, in-

cluding the apartment for which there is no probable cause to search, can be viewed as merely containing surplusage. See *State v. Rathushyn*, 82 N. J. Super. 499 (1964), which held that a warrant describing an entire apartment building, when probable cause is shown for searching only one apartment, is void for failure to comply with the Fourth Amendment, and that for purposes of particularization separate apartments are the same as separate dwellings.

Also, in our case, the conclusion most difficult to escape is that the officers were guessing there was some numbers activity being carried on in one of these apartments, so they got a warrant in hopes of confirming their suspicions.

II.

In the next division of its argument, respondent would have this Court approve the use of "John Doe" warrants. In our judgment, the fact that such denomination was required further strengthens the position taken by petitioners that no probable cause was available. Also, that to sanction such a warrant in face of the concession by Respondent, that: "Here the petitioners names were not known to the officers" (Respondent Brief, at page 13), would create a situation where the lack of an identification would entitle the officer to a broader warrant than he could obtain with the identification.

On the other hand, if the officers had had probable cause to arrest any person, such information would have yielded a description sufficient enough to have satisfied the requirements of the constitution. *Dow v. State*, 207 Md. 80, 113 Atl. 2d 423 (1955); *Garret v. State*, 270 P. 2d 1101 (Okla. Crim. 1954); *Parker v. Tenn.*, 177 Tenn. 380, 150 S. W. 2d 725 (1941).

III.

In defending the general designation, on their warrant, of all the property one would expect to find in a numbers office, as the property to be seized, the respondent ignores the fact that not even their "informer" gave them any information as to precisely what property could be found on these premises. Indeed, the informer's information supposedly related to a different address and was of a general and unspecified nature. To be sure, it was not established that the informer had ever seen this evidence (see *Rugendorf v. United States*, 376 U. S. at 532), and the trespassing officer stated only that he heard adding machine noises. At best, the conclusion that all of these particularized items of property would be found on the premises was the "educated" guess of Sergeant Delau, as distinguished from the magistrate. If this is so, can the educated guess of a policeman supplant the sensible requirement that the magistrate must make his own independent judgment as to the existence of probable cause to believe property, he would authorize a search for, was at a particular place? Here, we contend that this was a general warrant and authorized a general or exploratory search in a manner not significantly dissimilar to the search forbidden by this Court in *Stanford v. Texas*, 379 U. S. 476 (1965).

IV.

The respondent further argues that ultimate persuasibility is to be accorded the conclusions of the officers because "[t]o their experienced ears such noises mean characteristic sounds of clearinghouse activity." And that "[t]he sound of such activity coming from within the apartment certainly justified a man of reasonable caution to conclude that the crime of operating a clearinghouse

was being committed." (Respondent's Brief at pages 14-15.) Also, it is asserted that the facts upon which these officers predicated their belief were set out in the affidavit. In addition to being ambiguous, such contention cannot find support in the facts which show as the sole affidavit submitted to the magistrate being that of Sergeant Delau.

Moreover, in this same regard, it is interesting to note (1) Sergeant Delau testified that he was not asked, nor did he relate to the magistrate who the informer was. And (2) nowhere does it appear, in the affidavit, what were the specifics of the informer's information. In addition to this, (3) nowhere in the affidavit, or the evidence, is there even the suggestion that the magistrate was informed of some of the underlying circumstances from which the informant concluded that John Powers was conducting a clearinghouse operation on Edmonton Avenue; and (4) nowhere in the affidavit, or the evidence, is there even the suggestion that the magistrate was informed of some of the underlying circumstances from which the officer concluded that his informant, whose identity was not even inquired into (R. 58-62), was credible or his information was reliable. Cf. *Rugendorf v. United States,* 376 U. S. 528 and *Jones v. United States,* 362 U. S. 257.

V.

Under the next division of its Brief, Respondent argues for the crystallization by this Court of the questionable practice whereby patently defective warrants can be cured by belated claims that evidence other than that reduced to affidavit form was considered by the issuing magistrate before he authorized the search. Merely to say this would be a practice fraught with dangers—less only in

degree, to that of the "fictitious or phantom informer"—may be sufficient.

On the other hand, at least this much is clear: this magistrate did not have a distinct recollection of what, if anything, was said by anyone when he participated in the warrant process here involved.

VI.

By the final remarks, in its brief, respondent disputes that *McDonald v. United States*, 335 U. S. 451, supports petitioners' contentions. In doing so they approvingly quote from the concurring opinion by Mr. Justice Rutledge. (Respondent's Brief, page 21.) The precise language being referred to is the statement:

> "But it seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security against unlawful breaking and entry."

And then they conclude that "the occupants of apartment 6 had 'no right to exclude from the common hallways the police officers who entered lawfully.' " Such reasoning is clearly fallacious, which fallacy lies in the fact that an essential premise in their syllogism is defective. It assumes a fact at least in issue if not resolvable against them; that is, was the officer lawfully on the premises after he entered the common doorway and ascended to the common hallway "to see what the persons inside were doing" (R. 140-141). He was a trespasser pure and simple. This conclusion seems inescapable.

CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in their petition for Writ of Certiorari, petitioners renew their prayer that the petition for Writ of Certiorari be granted.

Respectfully submitted,

JAMES R. WILLIS,
Counsel for Petitioners.